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No. 83-395

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCES BRAHNA DENBERG AND ALBERT A. DENBERG, ETC., PETITIONERS

v.

UNITED STATES RAILROAD RETIREMENT BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT S. GREENSPAN
FRANK A. ROSENFELD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether an appeal must be taken directly to this Court under 28 U.S.C. 1252 — rather than to the court of appeals under 28 U.S.C. 1291 — when a district court has held an Act of Congress unconstitutional and the government challenges only the relief awarded and the jurisdiction of the district court.

2. Whether the judicial review provisions of the Railroad Retirement Act precluded the district court from exercising jurisdiction in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-33a) is reported at 696 F.2d 1193. The court's May 10, 1983 order modifying the opinion (Pet. App. 42a-43a) is reflected in the published opinion (696 F.2d at 1195). The opinions of the district court (Pet. App. 34a-41a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1983 (Pet. App. 44a-45a). On May 10, 1983, the court of appeals denied a petition for rehearing (Pet. App. 42a-43a). On August 3, 1983, Justice Stevens extended the time for filing a petition for a writ of certiorari to September 8, 1983. The petition was filed on September 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The underlying issue in this case is the scope of retroactive benefits to be paid by the Railroad Retirement Board after this Court held unconstitutional one of the eligibility provisions of the Railroad Retirement Act of 1974 (45 U.S.C. (& Supp. V) 231 *et seq.*) in *Railroad Retirement Board* v. *Kalina*, 431 U.S. 909 (1977), aff'g 541 F.2d 1204 (6th Cir. 1976). See also *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (holding unconstitutional a similar provision of the Social Security Act). 45 U.S.C. 231a(c)(3)(ii), held invalid in *Kalina*, imposed a dependency test on husbands of wage earners seeking spousal benefits, but imposed no such test on wives of wage earners.

1. This nationwide class action was filed in the United States District Court for the Northern District of Illinois in 1976 by a husband who had applied for and was denied benefits in 1975.[1] After this Court's decisions in *Kalina* and *Goldfarb* the Railroad Retirement Board began paying benefits without regard to the dependency test, but only for periods beginning in March 1977, when *Goldfarb* was decided. In *Wright* v. *Califano*, 603 F.2d 666 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980), the Seventh Circuit held that the Social Security Act requires payment of back benefits (even before March 1977) to nondependent husbands who applied for and were denied benefits, as of one year prior to the date of application. The district court in this case, in awarding class relief, found *Wright* controlling because the relevant provisions of the Railroad Retirement Act parallel the Social Security Act.

The class entitled to benefits under the district court's order, however, was not limited to those who applied for and were denied benefits. Nor were class members restricted to back benefits for one year prior to the dates of their

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[1]He was joined as a named plaintiff by his wife (Pet. App. 4a).

applications. Instead, the district court held that any non-dependent husband who was otherwise eligible under the substantive rules of the Act (such as age and the retirement or disability of his covered wife) could receive benefits back to April 1974, even if he had never applied for benefits or had applied long after that date.

The Board argued that this relief violated the requirement in the Railroad Retirement Act that each claimant for benefits must file an application (45 U.S.C. 231a(c)(1)) and may collect benefits for no more than one year prior to the date of his application (45 U.S.C. 231d(a)).[2] Acknowledging the unconstitutionality of the eligibility provision struck down in *Kalina*, the Board appealed on the issue of the scope of relief. It also contended that, under 45 U.S.C. (Supp. V) 355(f), the district court lacked jurisdiction.

2. The court of appeals reversed (Pet. App. 3a-33a). It held that the district court lacked jurisdiction to entertain this action. The court noted that the Railroad Retirement Act provides that judicial review of the denial of benefits may be had by filing a petition for review in the court of appeals. See 45 U.S.C. 231g and 45 U.S.C. (Supp. V) 355(f). And Section 10(b) of the Administrative Procedure Act (now codified 5 U.S.C. 703) requires that "if there is a special statutory review proceeding, it is exclusive" (Pet. App. 6a; see *id.* at 8a-9a). The court recognized that administrative appeal after the initial denial of benefits would

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[2]Section 231d(a) provides:

> An annuity under section 231a of this title shall begin with the month in which eligibility therefor was otherwise acquired, but —
>
> (i) not earlier than the date specified in the application therefor; [and]
>
> (ii) not earlier than the first day of the twelfth month before the month in which the application therefor was filed • • •.

have been futile, since Denberg had challenged the constitutionality of a statute that plainly denied him benefits, and the Board had no authority to declare the statute unconstitutional (Pet. App. 6a). The court thus concluded that he was entitled after the initial decision denying benefits to "go directly to court for review of the denial. * * * But unless section 10(b) of the Administrative Procedure Act is to be ignored, it is to the court of appeals that he must go" (Pet. App. 7a).

The court of appeals also noted that the district court lacked jurisdiction over the class members, since it had no jurisdiction over Denberg, their representative (Pet. App. 10a). Moreover, those class members who had not applied for benefits were precluded from seeking judicial review in any forum. "[T]he exhaustion requirement of section 5(f) [45 U.S.C. (Supp. V) 355(f)] was applicable to this case to the extent of requiring anyone who wanted to get judicial review of the dependency requirement in the Railroad Retirement Act to apply to the Board for retirement benefits and to obtain from the Board a decision on his application" (Pet. App. 11a).

Judge Wood, dissenting, would have found 28 U.S.C. (Supp. V) 1337 a proper basis for district court jurisdiction, because exhaustion of administrative remedies here would have been futile (Pet. App. 15a-21a). He also agreed with the district court that sovereign immunity would not bar recovery of back benefits by class members (*id.* at 22a-28a). Judge Wood nevertheless in large part agreed with the government on the merits. He concluded that only class members who had filed applications could recover back benefits, and that the recovery of back benefits was limited to the one-year period specified in the Act (*id.* at 28a-33a).

On May 10, 1983, the court of appeals denied petitioners' rehearing petition (Pet. App. 42a-43a). The order denying rehearing also added a paragraph to the court's opinion,

stating that jurisdiction on appeal from the district court's order properly lay in the court of appeals under 28 U.S.C. 1291, rather than in this Court under 28 U.S.C. 1252 (Pet. App. 43a). The court reasoned that the district court had not held an Act of Congress unconstitutional — the prerequisite for Section 1252 jurisdiction — because this Court had already held the statute at issue invalid in an earlier case (Pet. App. 43a).

ARGUMENT

Petitioners correctly note that the threshold question of the court of appeals' jurisdiction is similar to the issue in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983). This Court's decision in *Edwards* is likely to be controlling here. We thus agree with petitioners' suggestion that this case be held pending the decision in *Edwards*. If this Court agrees with our submission in *Edwards* — that a direct appeal does not lie under 28 U.S.C. 1252 when the appeal does not seek review of the lower court's holding that an Act of Congress is unconstitutional — the petition should be denied.

1. Under 28 U.S.C 1252 this Court has jurisdiction over any appeal "from an interlocutory or final judgment, decree or order of any court of the United States * * * holding any Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." 28 U.S.C. 1291 makes this Court's jurisdiction exclusive, since it permits appeals to the courts of appeals "from all final decisions of the district courts * * *, except where a direct review may be had in the Supreme Court." We have argued in *Heckler* v. *Edwards*, *supra*, that when a district court has held an Act of Congress unconstitutional but the appellant challenges only the relief ordered — not the holding of unconstitutionality — the

appeal must be taken to the court of appeals under Section 1291, rather than to this Court under Section 1252.

In this case, as in *Edwards*, the government conceded in the district court that the statute at issue was unconstitutional in light of *Califano* v. *Goldfarb*, *supra*, and subsequent cases (Pet. App. 4a; 82-874 Pet. Br. 4). In this case, as in *Edwards*, the government disagreed with the scope of the relief ordered by the district court to remedy the conceded unconstitutionality of the statute, and appealed the issue of relief to the court of appeals (Pet. App. 5a; 82-874 Pet. Br. 9-10 & n.9).[3] Indeed, in our brief in this Court in *Edwards* we argue that the court of appeals' holding here supports our conclusion that in these circumstances direct appeal does not lie under 28 U.S.C. 1252 (82-874 Pet. Br. 17, 20, 36-39).

If this Court concludes in *Edwards* that the court of appeals had jurisdiction under 28 U.S.C. 1291 to entertain the government's appeal on the issue of relief, it follows that

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[3]In this case the government also argued that the district court lacked subject matter jurisdiction, since the Railroad Retirement Act vests exclusive jurisdiction to review claim denials in the courts of appeals. Like the issue of relief, however, the issue of jurisdiction is entirely distinct from the holding of unconstitutionality. It is true that the court of appeals' disposition on jurisdictional grounds in effect vacates the entire judgment of the district court — including the judgment on the constitutional question. But that fact alone would not require a direct appeal on the jurisdictional issue, since this Court has itself held 45 U.S.C. 231a(c)(3)(ii) invalid, and its decision will be binding on any forum where Denberg may bring his claim. Moreover, even if this Court had not yet decided the constitutional issue, it would make little sense to require a direct appeal on the question of jurisdiction alone, since any decision on that question would still leave the underlying constitutional issue unresolved by this Court. And the very purpose of allowing direct appeal under Section 1252 is to ensure a "prompt determination by [this Court] of disputed questions of the constitutionality of acts of the Congress." H.R. Rep. 212, 75th Cong., 1st Sess. 2 (1937). We note that in the case of three-judge courts, this Court has held that an appeal limited to jurisdictional issues should be taken to the court of appeals, rather than to this Court. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974).

the appeal taken by the Board to the court of appeals in this case was also proper. This Court may then proceed to consider petitioners' claim concerning the underlying issue addressed by the court of appeals. If, on the other hand, the Court should hold in *Edwards* that even appeals limited to the question of relief must be taken directly to this Court under Section 1252, it would appear that the court of appeals in this case did not have jurisdiction. We have urged in *Edwards* that, in the event of that outcome, the Court should remand to the district court for entry of a fresh decree from which a timely appeal may be taken under 28 U.S.C. 1252. We suggest that the same procedure would be appropriate here.[4]

2. If this Court holds in *Edwards* that the courts of appeals have jurisdiction over cases such as this, it should deny the petition. The court of appeals' interpretation of the judicial review provisions of the Railroad Retirement Act is clearly correct, and does not conflict with any decision of this Court or of any other court of appeals.

Under the terms of the Railroad Retirement Act, an individual is "entitled to a spouse's annuity, if he or she has filed application therefor" and satisfies the other statutory criteria (45 U.S.C. 231a(c)(1)). If the threshold requirement of filing an application is fulfilled but the applicant is denied benefits for some other reason, 45 U.S.C. 231g provides that the Board's decision "shall be subject to judicial review" in the same manner as decisions under the Railroad Unemployment Insurance Act, 45 U.S.C. (& Supp. V) 351 *et seq.* The judicial review provision of that Act states (45 U.S.C. (Supp. V) 355(f)):

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[4]We have served counsel for petitioners with copies of our brief and reply brief in *Edwards*.

> Any claimant * * * may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review * * * in the United States court of appeals for the circuit in which the claimant * * * resides * * *, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia.

Use of that procedure is made mandatory not only by the terms of 45 U.S.C. 231g, but also by Section 10(b) of the Administrative Procedure Act (now codified at 5 U.S.C. 703), which states that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute[,]" unless that proceeding is "absen[t] or inadequa[te]." [5] Indeed, as the court of appeals here noted, "the courts, with or without mention of section 10(b) of the Administrative Procedure Act, have held repeatedly that when Congress provides for review jurisdiction in the courts of appeals, their jurisdiction is exclusive" (Pet. App. 8a).

In this case Albert Denberg applied on April 7, 1975, for spouse's benefits under the Act; his application was denied because he did not meet the dependency requirement (Pet. App. 13a). At that point, as petitioners have correctly conceded (*id.* at 7a), Denberg could have sought review in the court of appeals and there raised his constitutional claim.

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[5] Moreover, 45 U.S.C. 355(g), also incorporated by Section 231g, states:

> (g) Finality of Board decisions
>
> Findings of fact and conclusions of law of the Board in the determination of any claim for benefits * * * shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

He chose instead, for reasons not apparent, to proceed in district court. As the provisions of the Act set out above make clear, however, the availability and (so far as Denberg's own claim was concerned) adequacy of review in the court of appeals made the jurisdiction of that court exclusive. In fact, "it is against common sense that a disappointed claimant should have a choice whether to seek judicial review in a district court with a right of appeal to the court of appeals, or in a court of appeals in the first place" (Pet. App. 7a).

Since the district court did not have jurisdiction over Denberg's individual claim, it is also clear that it had no jurisdiction over the class action he purported to bring. See *Snyder* v. *Harris*, 394 U.S. 332 (1969). Even if the rule of *Snyder* were not applicable, the district court would have erred in certifying a class of some 5450 members, only 15 of whom had applied to the Board for benefits (Pet. App. 9a). It would, after all, be quixotic to hold that the unnamed class members — by virtue of failing to apply for benefits —were entitled to a forum from which Denberg himself was excluded. More lenient jurisdictional treatment of the non-applicant class members is particularly unwarranted when one considers that, quite apart from the invalid dependency provision, they would not be entitled to benefits under the Act in *any* forum. As Judge Wood noted in dissent: "45 U.S.C. § 231a(c)(1)[] provides that as a condition for the receipt of spouse benefits, the claimant must have *filed an application*" (Pet. App. 31a n.11) (emphasis in original).[6]

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[6]In *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980), on which petitioners rely (Pet. 8, 13), all the members of the plaintiff class had filed applications for Railroad Retirement annuities (79-870 J.S. App. 2a). The same was true in *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979), and *Wright* v. *Califano*, *supra*. And in *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), the Court held that "[a]s to class members, * * * the complaint is deficient in that it contains no

3. Petitioners nevertheless argue (notwithstanding the clear directions given in 45 U.S.C. 231a(c)(1), 45 U.S.C. 355(g), and 5 U.S.C. 703) that the only purpose of the judicial review provision (45 U.S.C. (Supp. V) 355(f)) is to assure exhaustion of administrative remedies, and that such an exercise is not required in a case like this, where it would be futile. They assume that the administrative process, because it is unable to address the constitutional question, is simply an unnecessary preliminary to the relief they sought in district court (Pet. 9-10).

This approach, however, confuses the need to *apply* for benefits with the need to *exhaust* administrative remedies. The court of appeals noted that requiring an applicant to pursue administrative remedies to the point of exhaustion "would have been futile here because the Railroad Retirement Board does not have the authority to declare statutes that it administers unconstitutional" (Pet. App. 6a). See *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975). But it is quite a different matter to say that one seeking benefits is excused from even applying, when the Act states unequivocally that filing an application is a substantive condition of entitlement (45 U.S.C. 231a(c)(1)).

Nor is the insistence on an application a useless formality. There are, after all, myriad reasons why many members of the class certified by the district court would not be entitled to benefits even after the dependency requirement was stricken from the Act. For example, the spouse may not have attained the requisite age (45 U.S.C. 231a(c)(1)(ii)); or the covered worker may not have completed the requisite period of service (45 U.S.C. 231a(a)(1)). In this very case the district court, after holding the dependency requirement

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allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought."

unconstitutional, "did not try to determine which members of the class were entitled to benefits, but instead ordered the Board to make that determination" (Pet. App. 12a). It is no more efficient to have the Board make such determinations after the district court's decision than it is to do so in advance. Indeed, doing so in advance — as the Act requires — will often spare the judicial system the burden of considering unnecessary constitutional or statutory questions.[7]

Petitioners also contend (Pet. 11) that review in the court of appeals, unlike a class action, "is inadequate to furnish speedy relief to the large group of individuals suffering an unconstitutional deprivation." Such a claim comes with ill grace from the vast majority of the class members, who had never even filed an application for benefits until solicited by the notice ordered by the district court four years after this Court's decisions in *Kalina* and *Goldfarb*. In any event, the premise of petitioners' contention is false, since a holding of unconstitutionality by the Seventh Circuit on review of Denberg's individual claim would have had the same effect as the district court's class determination. 45 U.S.C. (Supp. V) 355(f) permits any claimant to obtain review of a denial of benefits in the Seventh Circuit, and the obvious consequence of that provision is that a decision by the Seventh Circuit — if not appealed by the Board to this Court — is effectively binding on all future cases.

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[7]One might argue that in the event a provision like the dependency requirement is sustained in court, a prior class action will spare *the Board* the trouble of rejecting a host of applications disqualified under that section of the Act. But a class action in district court is not the only means of accomplishing that end. The same issue can be raised in the court of appeals by the first applicant whose request for benefits is denied under the provision in question. And while the court of appeals' decision upholding the provision is not binding on other applicants as a matter of res judicata, its stare decisis effect will discourage unqualified applicants from seeking benefits.

4. There is little merit to petitioners' suggestion that the court of appeals' decision in this case conflicts with decisions of this Court and of other courts of appeals (Pet. 8, 12-14). It is true that in *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980), this Court decided an appeal from a district court decision holding unconstitutional certain provisions of the Railroad Retirement Act. But the question of the district court's jurisdiction was neither addressed by this Court nor raised by the parties. Moreover, even if the district court lacked jurisdiction in *Fritz*, that would not necessarily have prevented this Court from reaching the merits of the constitutional claim in an appeal under 28 U.S.C. 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); *Weinberger* v. *Salfi*, 422 U.S. at 763 n.8. But cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 418-419 (1982).

Nor does *Finnerty* v. *Cowen*, 508 F.2d 979 (2d Cir. 1974), present any sharper conflict. For as the court of appeals in this case noted, "the premise of the jurisdictional analysis in *Finnerty* was demolished a year later by *Weinberger* v. *Salfi*, *supra*, which distinguished the exhaustion from the jurisdictional function of statutes that prescribe the method of judicial review of agency action. See 422 U.S. at 766" (Pet. App. 10a). And in *Pope* v. *Railroad Retirement Board*, 672 F.2d 972 (D.C. Cir. 1982), as in *Fritz*, the issue of the district court's jurisdiction was not even addressed.[8]

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[8]Moreover, the claim in *Pope*, like the claim in *Ellis* v. *Blum*, 643 F.2d 68 (2d Cir. 1981), also relied on by petitioners (Pet. 12), was not one for benefits, but "only a procedural challenge, the adjudication of which will not affect the substantive question of * * * entitlement[.]" *Ellis* v. *Blum*, 643 F.2d at 82. As the Second Circuit itself has noted, there is an obvious difference between the two, and stricter adherence to statutorily prescribed modes of review is required in the case of claims for benefits. See *Dietsch* v. *Schweiker*, 700 F.2d 865, 868 (2d Cir. 1983).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Heckler* v. *Edwards*, No. 82-874. If the Court concludes in *Edwards* that a direct appeal does not lie to this Court under 28 U.S.C. 1252 when the government does not appeal a district court's holding of unconstitutionality, the petition should be denied. If the Court concludes in *Edwards* that a direct appeal must be taken under 28 U.S.C. 1252, it should vacate the judgment below and remand to the court of appeals with instructions to remand to the district court for entry of a new judgment from which a direct appeal may be taken to this Court pursuant to 28 U.S.C. 1252.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ROBERT S. GREENSPAN
FRANK A. ROSENFELD
Attorneys

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